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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

DONNA CROOKS and BRENDA HOLMES,
Petitioners,

vs.

HONORABLE JOHN H. MAYNARD,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Does a judge have immunity for an action under 1983 U.S.C. when he invokes, on his own initiative, the contempt power of the court against the clerk of the court and her assistant for the violation of an administrative order when they are not before him in any regular legal proceeding, when the facts on their face show there was no violation, when there has been no hearing, and the contempt is ordered outside of the courtroom and chambers.

II

Does a judge have civil immunity from an action under 42-1983 U.S.C. for the illegal use of contempt powers to punish an alleged disobedience of an administrative order when the judge has no jurisdiction to enter the order as a court but has authority as an administrative judge to make such an order.

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OPINIONS BELOW

The opinion delivered by the Court of Appeals for the Ninth Circuit, filed June 24, 1987, is set out in full in the appendix, p. 25. The opinion and order of the district court is set out in the appendix, p. 37, and was filed February 26, 1986.

BASIS FOR JURISDICTION

The jurisdiction of this court is invoked on the ground that the decision of the Court of Appeals for the Ninth Circuit in this case conflicts with decisions involving judicial immunity of state judges of the Courts of Appeals for the Fifth and Seventh Circuits.

(1) The original order for Summary Judgment by the District Court for the District of Idaho was dated February, 26, 1986, and entered on the same day. It was affirmed by an Opinion and Order of the Court of Appeals for the

Ninth Circuit on June 24, 1987.

(2) No rehearing in this case was sought or granted.

(3) The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (1) which reads as follows:

> "Cases in the Courts of Appeal my be reviewed by the Supreme Court by the following methods:
>
> (1) by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes involved in this case are lengthy and therefore their pertinent text is set forth in the appendix.

STATEMENT OF THE CASE

This statement of facts will be supported wherever possible by references to the Excerpts of Record filed with the

Court of Appeals for the Ninth Circuit.

Part of this record consists of testimony of both petitioner, Donna Crooks, and respondent, Honorable John H. Maynard, as set forth in the Excerpts of Record, pp. 61-75. More testimony of the respondent, the Honorable John Maynard, is set forth in a depostion taken by appellants and is set forth in the Excerpts of Record, pp. 76-77.

Petitioner, Donna Crooks, was appointed to the office of the Nez Perce County (Idaho) Auditor and Recorder and Clerk of the District Court after the former clerk retired. Excerpts of Record, p. 68 l. 21, p. 69 l. 7. Normally this is an elective office. Constitution of the State of Idaho, Article 18, Sec. 6. App. p. 48. After she took office, she hired petitioner, Brenda Holmes, to help with the coordination and the evaluation of the duties of the deputy clerks in the

district court. Excerpts of Record, p. 70 ls. 23-25. She was not hired as a deputy clerk. Excerpts of Record, p.71 ls. 1-4. After a confrontation with the then deputy chief clerk, Julie Palermo, respondent issued an administrative order. Excerpts of Record, p. 71 ls. 9-15. The order, Excerpts of Record, p. 23, stated, in pertinent part:

> "that the newly appointed coordinator (petitioner Brenda Holmes) shall perform no duties connected with the operation of the courts nor shall she interfere with the manner that the deputy clerks perform their duties."

The day after the delivery of the order to petitioner Crooks, she called respondent in an effort to discuss the matter but was rebuffed. Excerpts of Record, p. 72 ls. 1-7.

The clerks' office along with the courtroom and judges' chambers were on the second floor of the courthouse. The

offices for the recorder and auditor were on the first floor. On the day subsequent to the delivery of the administrative order the Chief Deputy, Julie Palermo, came down to the auditor's office to bring some bonding money and was asked some questions by petitioner Crooks. Immediatley upon the return of the deputy to the clerks' office petitioner Crooks was called by respondent and told that if she had any further conferences with any of the deputy clerks he would hold both she and petitioner Holmes in contempt of court. Excerpts of Record, p. 72 l.17, p. 73 l.4.

On the following day both petitioners went up to the second floor into a small room outside of the district court clerks' area to see if a computer could be installed in that room off the civil desk. They were checking for

electrical outlets on the wall and possible places for locations of computer terminals. Excerpts of Record, p.73 l.17-25. They were not disturbing or interfering with the clerks in the clerks' office. Excerpts of Record, p.74 ls. 1-4.

At that point one of the magistrates came out of his office and told them to leave the second floor as they were not supposed to be there. When they refused to do so, he called respondent to come out there. Respondent then ordered them to leave and when they refused to do so, called the sheriff and told him to take them to jail, which he did. Excerpts of Record, p.74 l.5- p.75 l. 17.

Later, on the 25th day of April, 1986, Judge Maynard issued an Order entitled "In the Matter of the Contempt of Donna Crooks and Brenda Holmes", in

which he stated that petitioners were disrupting the activities of the Deputy clerks. Excerpts of Record, p. 12. This was denied by petitioner Crooks. Excerpts of Record, p. 74, ls. 1-4.

Petitioners were released by order of the Idaho Supreme Court on the following day. Excerpts of Record, p.75 ls. 18, 19.

This civil rights proceeding was then initiated in the District Court for the District of Idaho pursuant to 42 U.S.C. 1983.

ARGUMENT

This petition for Writ of Certiorari is based on Rule 17.1(a) of the Rules of the Supreme Court in that the decision rendered by the Ninth Circuit Court of Appeals in this case is in conflict with the decision of another Federal Court of Appeals on the same matter. The issue in question is the

immunity of a state judge for his actions under Section 42 - 1983 U.S.C.

In this case the judge, in his capacity as the administrative judge of the judicial district in which he sat, issued an order under Section 1-907, Idaho Code, (App.p 43) in which he stated that the clerk of the district court had hired a person to coordinate the duties of the deputy clerks working with the courts and that such appointment was made without the knowledge of the administrative judge and also that no judge had had the opportunity to appraise the qualifications or integrity of the person. He then ordered that the said coordinator should perform no duties connected with the operations of the court or interfere with the manner in which the deputy clerks performed their duties (Excerpts of Record p.11). The so called coordinator was petitioner Brenda

Holmes. The full title of petitioner Donna Crooks was "Auditor, Recorder and Clerk of the District Court". Her duties as auditor and recorder were performed in an office on the first floor of the courthouse but the office of clerk of the district court was on the second floor. After the issuance of the administrative order by the judge, petitioner Crooks, who had been instructed to install a computer in the clerks' office, went along with petitioner Holmes to the second floor in a room adjacent to the clerks' office to investigate electrical outlets and other features for the installation of the computer. Excerpts of Record, p. 13, l. 17, p. 74, l. 4. This in no way violated the judge's administrative order. Nevertheless, a magistrate came out, ordered both Crooks and Holmes off the floor entirely, and when they refused to go, brought out the

judge, respondent Honorable John H. Maynard, who also ordered them to leave, and when they did not declared them in contempt and had them incarcerated in the county jail where they remained until released under a Writ of Habeas Corpus by the Idaho Supreme Court.

Under Idaho law the district court has original jurisdiction in all cases, both at law and in equity. Constitution of the State of Idaho, Article V, Section 20, appendix, p. 42. Also, by statute, the district court has original jurisdiction in all cases and proceedings. Idaho Code, Section 1-705.1, appendix, p. 42. The court has the powers for contempt under Section 7-603, Idaho Code, appendix, p. 47, and has powers to enforce order in the proceedings before it under Section 1-1603, of the Idaho Code, appendix, p. 57. We note that all of these statutes refer

to powers of the court as such. These statutes also all refer to some proceeding or case before it in its official capacity. However Section 1-907, appendix, p. 56, which gives powers to the administrative judge, refers only to the judge and refers only to the powers to be exercised outside of his scope as the presiding officer of a court of law.

The question then becomes: does the judge under these statutes have the power to declare in contempt some one who is not before him in the courtroom or his chambers, who has never been brought before him in an adversary proceeding of any kind, who has had no hearing and who is merely pursuing the duties assigned to her by constitution and statutes or by her employer, and when complying with a written administrative order?

Under these circumstances the ninth

circuit held that Judge Maynard was acting in a judicial capapcity. To be sure, the clerk of the district court is part of the judicial system. Her position requires that she follow the orders of the court when they involve the disposition of cases as they flow thru the court system. However, the events which form the basis of this controversary had nothing to do with the official duties of the judge sitting as a court or even in his position as the administrative judge. The clerk and her employee were merely investigating an area for future use of the clerks office, which area was public or at least, as Judge Maynard himself admits, "quasi-public". Excerpts of Record, p. 77, ls. 24, 25.

The facts of this situation are not, so far as we have been able to find, readily duplicated. Yet several cases

present factual situations where judicial immunity has been denied and which throws some light on the issue of judicial immunity. In the case of Harper v. Merckle, 638 F.2d 848 (5th cir. 1981), the court quoting from McAlester v. Brown, 469 F.2d 1280 (5th cir. 1972), set out the facts necessary to establish a judicial act. They are as follows:

> (1)The precise act complained of, use of the contempt power, is a normal judicial function;
> (2)The events involved occurred in the judge's chambers;
> (3)The controversary centered around a case then pending before the judge;
> (4)The confrontation arose directly and immediately out of a visit to the judge in his official capacity.

In this case, only the first of these four factors are present; the use of the contempt power is a normal judicial function. But, the events did not occur in the judge's chambers, the controversary did not center around a case then pending before the judge and

there was no visit to the judge in his official capacity. In fact there was no visit to the judge at all. The court in analyzing these factors concluded that the first two were present but because the last two were not, there was liability. To be sure the court did "caution that our holding is exceedingly narrow and is tailored to this, the rarest of factual settings." The court stated:

> "Succinctly stated, we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to "judicial acts. " These nonjudicial acts, to state the obvious, are not cloaked with judicial immunity from suit under Section 1983."

Judge Merckle in that case had

involved himself in a child support matter between Harper and his exwife. In a more recent case, McMillan v. Svetanoff, 793 F.2d 149, (7th Cir. 1986), the plaintiff was a court reporter who had been fired by the judge and the claim was that she was discharged because she was black. The district judge denied a motion for summary judgment on the grounds of absolute judicial immunity. In affirming the court said:

> "The rationale for a doctrine that excludes judges from liability for even intentional and malicious conduct while on the bench is that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability. (citation omitted) It is the concern for principled and fearless decision making which forms the basis for judicial immunity."

The court then referred to the case of Laskowski v. Mears, 600 F.Supp. 1568 (N.D. Ind. 1985) and noted with approval that that case held "the protections of

judicial immunity are not for the benefit of a malicious or discriminating judge, but rather for the benefit of the public and that the doctrine should be limited to its central purpose, . . ."

The judge in the case at bar as the judges in McMillan v. Svetanoff, Supra and in Harper v. Merckle, Supra, was acting in a purely administrative, nonjudicial, capacity. No judge sitting on the bench in any legally initiated adversary proceeding need feel any apprehension of liability by reason of a determination of liability on the part of the judge in this case.

In analyzing these cases we submit that the conduct of John Maynard in this case was fully as outrageous as was the conduct of Judge Merckle in the case of Harper v. Merckle, Supra. It may be conceded that one distinction between the two cases is that in the case at bar the

petitioners were employees of the court system while in the Harper case the injured party was acting in a completely private capacity. But it also true that in both of these cases the judges were acting completely outside the jurisdiction of their offices. The distinction between McMillan v. Svetanoff, Supra, and this case is that in McMillan the plaintiff was discharged from her employment while in the case at bar they were thrown in jail. In McMillan a statute provided that court personnel serve at the pleasure of the senior judge of each division who, in this case, was the superior of the judge who terminated the plaintiff's employment. While in the case at bar, the judge had no control over the employment of the clerk or her assistant, so he tried to use other measures to enforce his will. We would submit that

the jurisdiction of the judge is more questionable in the instant case than it was in McMillan. Dismissal was also the basis for a Section 1983 action in the case of Forrester v. White, 792 F.2d 647 (7th Cir. 1986), cert. granted 107 S.Ct. 1282 (1987) where a probation officer was dismissed allegedly on the basis of sex discrimination. The court there felt that the question of subject-matter jurisdiction made little sense since the plaintiff's claim did not arise directly out of litigation before the court. Therefore it held that the connection between the duties of a probation officer and the judge, "were inextricably tied to discretionary decisions that have consistently been considered judicial acts". Such a connection did not exist between petitioners and respondent at the time the acts which prompted this lawsuit were carried out.

As Judge Posner said in dissent:

> "The proper question is whether the decision was made in the judge's judicial capacity. Judges have both judicial and executive jurisdictions."

The order which Judge Maynard issued was purely an administrative order. The judge himself admitted it was an administrative order. Nowhere in the statutes is the administrative judge authorized to utilize his judicial power to enforce an administrative order. But the situation is even more serious than that. The petitioners were not in any way disobeying the administrative order. They were there, in an area, which the judge himself designated as quasi-public and in no way doing anything to interfere with the deputy clerks that were handling the courts business. They were simply looking around an empty room. No matter how one looks at it, the judge could not possibly have had jurisdiction to hold

petitioners in contempt nor did he even have the power, under his own pronouncements, to declare them in violation of any order he made and utilize the contempt power of the court to have petitioners incarcerated. The acts of Judge Maynard in this case, can only be characterized as outrageous and the granting of judicial immunity and the denial of relief to petitioners, raises another question as to the limits of judicial immunity which should be resolved.

CONCLUSION

We believe that the decision in this case is in direct conflict with the decisions cited from the United States Courts of Appeals from the Fifth and Seventh Circuits, and we therefore respectfully request that Certiorari to the United States Court of Appeals be granted.

DATED This _____ day of August, 1987.

TWAY LAW FIRM

_____
William J. Tway of the firm
Attorney for the Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 1987, three (3) copies of this PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT were delivered to the following parties, which constitute all parties required to be served:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

DONNA CROOKS, Plaintiff,	) CIV. NO.85-3074) (consolidated with) 85-3079)
v.	)
Hon. John H. Maynard, Defendant.	) MEMORANDUM) OPINION AND) ORDER

1. INTRODUCTION

Donna Crooks and Brenda Holmes each filed an action against Idaho Second District Judge John Maynard, alleging Judge Maynard violated rights afforded them by the United States Constitution and asserted under 48 U.S.C. Sec. 1983. A single incident occurring in the Second District Courthouse precipitated both complaints, and on Judge Maynard's motion, the court entered an order consolidating the two cases.

Judge Maynard brings this Motion for Summary Judgment on the sole grounds that the doctrine of absolute judicial immunity insulates him from liability to

either plaintiff. The court heard oral argument on defendant's Motion for Summary Judgment on February 19, 1986.

II. FACTS

On February 19, 1986, the parties filed a Stipulation of Undisputed Facts. Although there are disputed facts, all facts material to the court's disposition of Judge Maynard's Motion for Summary Judgment are undisputed and found in either the parties' stipulation for documents of record.

The Honorable John H. Maynard is a duly elected district judge for the Second Judicial District of the State of Idaho. Judge Maynard also serves as Administrative District Judge of that district. Donna Crooks became the duly appointed clerk of the district court and ex officio auditor and recorder for the County of Nez Perce, Idaho, in April 1985.

On April 23, 1985, Judge Maynard issued an administrative order preventing the newly appointed coordinator (Plaintiff Holmes) from performing any duties connected with the operation of the courts or interfere with the manner that the deputy clerks perform their duties. Crooks received a copy of this order on April 23, 1985.

On April 25, 1985, Crooks and Holmes went to the second floor of the Nez Perce County Courthouse where they were confronted by Magistrate Perry holding a copy of the April 23, 1985, administrative order. Judge Maynard subsequently came to the area and ordered Crooks and Holmes off the second floor of the courthouse. Judge Maynard informed the plaintiffs that they would be held in contempt if they did not leave the area. Neither Crooks nor Holmes would leave the floor of the courthouse.

Judge Maynard then gave Crooks and Holmes ten seconds to leave the area, after which he ordered the sheriff to take them to jail. On the same day, a written document entitled, "In the Matter of the Contempt of Donna Crooks and Brenda Holmes," was prepared and filed by Judge Maynard. This document recited Judge Maynard's view of the confrontation which had occurred on the second floor of the courthouse, and provided that shortly after the confrontation Judge Maynard had advised the jailer that as soon as either or both Crooks and Holmes announced that they would obey the administrative order, they should be brought before Judge Maynard for release.

III. DISCUSSION

This matter comes before the court on defendant's Motion for Summary Judgment. The defendant is entitled to judgment only if it appears from the

record that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law.[1]

Judge Maynard contends his actions were judicial acts taken where there was not a clear absence of jurisdiction, and therefore, he is insulated from liability by the doctrine of absolute judicial immunity. The plaintiffs, on the other hand, assert Judge Maynard's acts were administrative or ministerial and, therefore, were not judicial acts. Plaintiffs argue further that even if Judge Maynard's acts can be considered judicial acts, they were performed in the clear absence of jurisdiction.

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1 The Complaints seeks both injunctive relief and damages. Plaintiffs conceded at oral argument that because an action seeking injunctive relief is currently pending before the Idaho Supreme Court, plaintiffs are no longer seeking injunctive relief in this action.

The general rule is well established.

> Our jurisprudence has long recognized that "a general principle of the highest importance to the proper administration of justice [is] that a judicial officer [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." ... Though judicial prerogative is broad, two rules circumscribe it. First, the immunity covers only those acts which are "judicial" in nature....Second, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he acted in the 'clear absence of all jurisdiction.'"

O'Neil v. City of Lake Oswego, 642 F.2d 367, 369 (9th Cir. 1981) (citations omitted). Consequently, if the acts complained of were not "judicial acts," or were taken in the clear absence of all

jurisdiction, immunity will not attach.

Factually, this case must be dealt with in two parts. The first involves Judge Maynards' finding of contempt and summary punishment therefore. The second involves the issuance of the administrative order.

A. Finding of Contempt and Punishment Therefor

The Complaint contains three causes of action stemming from Judge Maynard's ordering the plaintiffs jailed: first, "imprisonment without due process of law"; second, "denial of their right to freedom from arrest except upon probable cause"; and third, by "violation of her right to be informed of the true nature and cause of the accusation against her, guaranteed by the sixth amendment."

Traditionally, courts have had the inherent power to summarily punish

contempt committed in their presence. Further, Idaho Code, Sec. 7-603 provides: "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily." Idaho Code Sec. 7-601 provides,

> The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:
>
> . . . .
>
> 3. Misbehavior in office or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

(emphasis added) The Plaintiffs' failure to comply with the administrative order falls within the broad category of "misbehavior in office" (Crooks as the clerk and Holmes as another person appointed to perform ministerial service)

subject to summary contempt under Idaho Code Sections 7-601 and 7-603. In light of the statutory provisions and the court's inherent power to summarily punish contempt committed in its presence, ~~the~~ court finds Judge Maynard did not act in the clear absence of all jurisdiction.

Similarly, Judge Maynard's acts finding contempt and punishing for that contempt were judicial acts. The Supreme Court has formulated two factors which determine whether an act performed by a judge is a 'judicial act.' An act is a judicial act if it involves a function normally performed by a judge, and second, if the parties intended or expected to deal with the judge in his judicial capacity. Stump v. Sparkman, 435 U.S. 349, 362 (1978).

There is little doubt that finding and punishing contempt is a

function normally performed by a judge. However, plaintiffs contend they were not dealing with Judge Maynard in his judicial capacity at the time of the confrontation on April 25, 1985. Plaintiffs reach this conclusion on the grounds that Judge Maynard was without authority to issue or enforce through contempt the previously entered administrative order.

It is clear from the allegations of the Complaints, as well as the affidavits of Plaintiff Crooks, that Crooks and Holmes were challenging Judge Maynard's authority to enter and enforce the administrative order when they refused to leave the second floor of the courthouse. Their refusal also defied Judge Maynard's authority to order them off the second floor of the courthouse as a means of enforcing the administrative order. A person who openly challenges or

confronts a judge's authority to enter and enforce a court order is dealing with the judge in his judicial capacity.[2]

Consequently, the two "exceptions" to absolute judicial immunity are not present with regard to Judge Maynard's finding contempt and summarily punishing that contempt. Judge Maynard is absolutely immune from liability for those acts.

Finally, this result is consistent with the underlying purpose of judicial immunity. A judge should "be free to act upon his own convictions, without apprehension of personal consequences to himself." Stump v. Sparkman, 435 U.S. at

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2The case might be different if Judge Maynard had not issued an administra-tive order prior to the confrontation. If no attempt was made to cloak his actions with judicial authority, Judge Maynard may not have been acting strictly as an employer. However, such is not the case. Judge Maynard did cloak his actions with judicial authority, and the plaintiffs challenged that judicial authority. Plaintiffs cannot now claim they were not dealing with Judge Maynard in his judi-cial capacity.

355 (quoting Bradley v. Fisher, 13 Wall 335, 347, 20 L.Ed. 646 (1872). Judge Mahan more critically and narrowly describes the purpose of the doctrine:

> Common-law immunities extend only so far as the interests of the common good demand protection for the holder of the office from liability for carrying out his official functions. The application of the doctrine of judicial immunity is restricted to its single objective of protecting judicial freedom in the process of deciding civil and criminal cases. Where the initiative and independence of the judiciary is not effectively impaired, the doctrine of judicial immunity does not hold.

Laskowski v. Mears, 600 F.Supp. 1568, 1574 (N.D.Ind. 1985) (quoting Shore v. Howard, 414 F.Supp. 379, 385 (N.D.Tex.1976)). Obviously, Judge Maynard felt disobedience of his written administrative order and his oral order that Crooks leave the building warranted

summary contempt. Therefore, protecting his action is necessary to avoid impairment of the initiative and independence of the judiciary. This is not to say that the action of Judge Maynard in imposing a jail sentence for disobeying an order directed toward only ministerial activities, without the barest essentials of due process, can be condoned. Such draconian measures hardly further the interest of justice. However, it is clear that immunity will attach to summary contempt proeedings even though the judge's conduct constitutes the most egregious disregard of basic procedural requirements. O'Neil v. City of Lake Oswego, 642 F.2d 367 (9th Cir. 1981); Mcalester v. Brown, 469 F.2d 1280 (5th Cir. 1972).

B. The Administrative Order

The plaintiff complains that Judge Maynard's written administrative

order, as well as his verbal attempts to direct Crooks' work as clerk, was a "usurpation" of her constitutional office.[3] There is a split of opinion on the question of whether a judge acting as an employer or personnel supervisor acts in his judicial capacity for purposes of immunity or simply in an administrative or ministerial capacity like any other employer or supervisor. While the question is an interesting one, and the case of Laskowski v. Mears, 600 F.Supp. 1568 (N.D.Ind. 1985), provides an

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3 Crooks also complains that she was denied her first amendment rights of association and free speech and her personal rights reserved and retained under the ninth and tenth amendments. The allegations of the Complaint fail to demonstrate how the ninth and tenth amendment rights might pertain to Judge Maynard's actions--the ninth amendment simply provides that the enumerated constitutional rights shall not be construed to deny other rights retained by the people, and the tenth amendment provides only that the powers not delegated to the United States are reserved by the states. As to the

(Cont. on next page)

excellent discussion of the issue (and a persuasively reached conclusion that immunity does not apply), the court need not resolve the issue to dispose of the pending Motion for Summary Judgment. There is simply no constitutional or statutory deprivation alleged to have resulted from Judge Maynard's administrative order.

Paragraph XIX of Crooks' Complaint states the acts of Judge Maynard:

> deprived the plaintiff of privileges and immunities secured by the Constitution of the United States in the following particulars:
>
> 1. By usurpation of her constitutional

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first amendment, the court can only surmise that somehow Crooks and Holmes are complaining that Judge Maynard's orders prevented them from associating with other court personnel. Absent factual allegations demonstrating Judge Maynard's actions prevented the plaintiffs from freely associating with other persons or exercising their rights of free speech, those claims

> office, which deprived her of the due process right to have the defendant, acting under color of state office, observe the Constitution and laws of the State of Idaho.

This is, at best, a novel claim. The court is unaware of a federal constitutional due process right which requires a state judge to observe the constitution and the laws of the State of Idaho. While it may be true that Judge Maynard could violate the constitution or the laws of the State of Idaho, and therefore be exposed to liability, federal due process does not inherently require compliance with either the constitution or the laws of the State of Idaho.

Crooks and Holmes have not made

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must be dismissed for failure to state a claim upon which relief might be granted.

out a claim that Judge Maynard's acts of "interfering' with the performance of their jobs implicates federal constitutional or statutory deprivations. Hence, the Complaint fails to state a claim for relief on this grounds, and the court need not address the question of immunity in this regard.

IV. CONCLUSION

Although the contempt was based upon disobedience to an administrative order which may or may not have been a 'judicial act,' the acts of finding contempt and summarily punishing that contempt were judicial acts and were not taken in the clear absence of all jurisdiction. Therefore, Judge Maynard is absolutely immune from liability for those acts.

The plaintiffs have failed to allege facts sufficient to state a claim that there is either a federal

constitutional or statutory deprivation resulting from entry of the administrative orders (both verbal and written) issued by Judge Maynard. Therefore, the Complaint fails to state a claim in this regard and must be dismissed.

V. ORDER

Based upon the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the defendant's Motion for Summary Judgment should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that all claims of Plaintiff Crooks in Case No CIV 85-3074 and Plaintiff Holmes in Case No. CIV 85-3079 should be, and are hereby, DISMISSED.

DATED this 26 day of February, 1986.

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

CONSTITUTION OF THE STATE OF IDAHO

Article 5, Section 20

Jurisdiction of district court. - The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law.

IDAHO CODE

1-705 Jurisdiction - Original and appellate. - The district court has original jurisdiction:

1. In all cases and proceedings.

2. In the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers.

3. Its appellate jurisdiction extends to all cases assigned to magistrate's division of the district court; and to all other matters and cases wherein appeal is allowed by law.

1-907. Administrative judge - administrative powers and duties. - The administrative judge or acting administrative judge in each judicial district, subject to the rules of the Supreme Court, shall have administrative supervision and authority over the operation of the district courts and magistrates in the district. These powers and duties include, but are not limited to, the following:

(a) arranging schedules and assigning district judges for sessions of district courts;

(b) arranging or supervising the calendaring of matters for trial or hearing;

(c) supervising the clerks of the district courts in the discharge of the clerical functions of the district courts;

(d) assigning matters to magistrates,

and prescribing times and places at which magistrates shall be available for the performance of their duties;

(e) making arrangements with proper authorities for the drawing of civil jury panels and determining which sessions of the district court shall be jury sessions;

(f) arranging for the reporting of civil cases by court reporters or other authorized means;

(g) arranging sessions, to the extent practicable, for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;

(h) promulgating a schedule of offenses for which magistrates and clerks of court or other designated persons may

accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines and bails therefor;

(i) assigning magistrates to temporary duty outside the county of their residence, but within the district;

(j) acting as chairman of the district magistrates commission of the district; and,

(k) assigning to other district judges in the district various powers and duties [as] in this act provided. [1969, ch. 102, Sec.1, p.347; am. 1974, ch. 26, Sec. 2, p.804.]

1-1001. Duties of clerk. - The clerk of the district court must perform such duties as are prescribed in the Code of Civil Procedure and in the Penal Code, and such duties as may be required of him by the rules and practice of the court.

1-1603. Powers of court. - Every court

has power:

1. To preserve and enforce order in its immediate presence.

2. To enforce order in the proceedings before it or before a person or persons empowered to conduct a judicial investigation under its authority.

3. To provide for the orderly conduct of proceedings before it or its officers.

4. To compel obedience to its judgements, orders and process, and to the orders of a judge out of court in an action or proceeding pending therein.

5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.

6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner

provided in this code.

7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties.

8. To amend and control its process and orders so as to make them conformable to law and justice.

7-603. Contempt in presence of court. - Punishment. - When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall

be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer. [C.C.P. 1881, Sec. 832; R.S., R.C., & C.L., Sec. 5157; C.S., Sec. 7385; I.C.A., Sec. 13-603.]

CONSTITUTION OF THE STATE OF IDAHO

Article 18, Section 6

6. County officers. - The legislature by general and uniform laws shall, commencing with the general election in 1970, provide for the election biennially, in each of the several counties of the state, of county commissioners and a coroner and for the election of sheriff and a county assessor and, a county treasurer, who is ex officio public administrator, every four (4) years in each of the several counties of the state. All taxes shall be collected by the officer of officers

designated by law. The clerk of the district court shall be ex officio auditor and recorder. No other county offices shall be established, but the legislature by general and uniform laws shall provide for such township, precinct and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. The legislature shall provide for the strict accountability of county, township, precinct and municipal officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them, or officially come into their possession. The county commissioners may employ counsel when necessary. The sheriff, county assessor, county treasurer, and ex officio tax collector, auditor and recorder and clerk of the district court shall be empowered by the

county commissioners to appoint such deputies and clerical assistants as the business of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONNA CROOKS and BRENDA HOLMES, *Petitioners-Appellants,* v. HONORABLE JOHN H. MAYNARD, *Respondent-Appellee.*	No. 86-3629 D.C. No. CV-85-3074 OPINION

Argued and Submitted
March 4, 1987—Portland, Oregon

Filed June 24, 1987

Before: Joseph T. Sneed and Cynthia Holcomb Hall, Circuit Judges, and Albert Lee Stephens, Jr.,* District Judge.

Opinion by Judge Sneed

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

SUMMARY

Civil Rights/Judges

Appeal from a district court's grant of summary judgment based on judicial immunity in a case brought under section 1983. Affirmed.

*Honorable Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

Appellant Donna Crooks was clerk of the district court for an Idaho state district court. She hired appellant Brenda Holmes to assist her in the coordination, organization and evaluation of the deputy clerks.

After learning of Holmes' hiring, Judge John Maynard issued an order limiting Holmes' duties and requiring Crooks to submit a plan whereby working conditions be restored to their former status. Two days after the order was issued, Crooks and Holmes were jailed for contempt of court after refusing to leave the hallway adjacent to the clerk's office. They were released the next day by order of the Idaho Supreme Court. After a writ of prohibition was sought from the state supreme court to restrain the judge from enforcing his order, he rescinded the first order and the contempt order, but the new order also stated that Holmes was not permitted to act as deputy clerk because she was not hired pursuant to established practice.

Crooks filed an amended petition for writ of prohibition restraining enforcement of the final order, and requesting a general injunction prohibiting interference with the operations of the office of clerk of the district court. The Idaho Supreme court denied. Meanwhile a section 1983 civil rights action was filed by the appellants in which Crooks alleged that her constitutional office was usurped, and both Crooks and Holmes alleged they were imprisoned without due process of law, they were denied rights of association and free speech, they were arrested without probable cause, and their right to be informed of the true nature and cause of the accusation against them was violated. The U.S. District Court held that Maynard was protected by absolute judicial immunity and granted summary judgment in his favor.

[1] Judges are immune from damage liability for acts performed in their official capacities. The immunity is absolute, and applies even where a judge acts maliciously. [2] *Stump v. Sparkman*, 435 U.S. 349 (1978), established a two part test

for determining whether a judge enjoys absolute immunity from money damages in a suit under section 1983. The initial inquiry is whether the judge dealt with the plaintiff in his judicial capacity (if not he is not absolutely immune) and the second part focuses on whether he was acting in clear absence of all jurisdiction.

[3] In determining whether a particular act is a judicial one two factors must be considered: (1) whether it is a function normally performed by a judge and (2) whether the parties dealt with the judge in his official capacity. [4] Maynard acted in a judicial capacity when he entered and sought to enforce an order that, while directed at what might be perceived to be an administrative problem, was within his power to enter. [5] As to the second part of the *Stump* test, Idaho law gives every court the power to compel obedience of its orders, [6] recognizing an inherent common law contempt power. [7] A judge using his judicial contempt power as a means of enforcing an administrative order aimed at ensuring effectiveness in the operation of the district court, while perhaps not acting wisely, is not acting in the clear absence of all jurisdiction.

COUNSEL

William J. Tway, Anton Hohler, Boise, Idaho, for the petitioners-appellants.

Brian K. Julian, Kathryn A. Sticklen, Boise, Idaho, for the respondent-appellee.

OPINION

SNEED, Circuit Judge:

The plaintiffs, Donna Crooks and Brenda Holmes, brought 42 U.S.C. § 1983 actions against Idaho District Judge John

H. Maynard. The plaintiffs claimed that Judge Maynard violated their constitutional rights to procedural due process by jailing them pursuant to a contempt order. The district court, upon the filing of a stipulation of undisputed facts, found that Judge Maynard was immune from liability and granted summary judgment in his favor. We affirm.

I.

FACTS AND PROCEEDINGS BELOW

At all times relevant to this case, John Maynard was a duly elected district judge for the Second Judicial District of the State of Idaho. Judge Maynard also served as Administrative District Judge (a not unusual but troublesome title nonetheless) of that district. Donna Crooks was the duly appointed clerk of the district court for Nez Perce County. Apparently the troubles began in April 1985 when Crooks hired Brenda Holmes to assist her in the coordination, organization and evaluation of the deputy clerks. Holmes was hired without the knowledge of Judge Maynard and without the opportunity for any judge to appraise her qualifications and integrity. On April 23, 1985, Judge Maynard, after learning of Holmes' hiring, issued an administrative order providing that Holmes "shall perform no duties connected with the operations of the courts nor shall she interfere with the manner that the deputy clerks perform their duties." Excerpt of Record at 11. The order further required that Crooks "submit a plan whereby the working conditions be restored to their former excellent status or in the alternative, withdraw from further interference with the deputy clerks [sic] pursuit of their lawful duties." *Id.*

On April 25, 1985, Crooks and Holmes went to the second floor of the Nez Perce County Courthouse. While they were in the hallway adjacent to the clerk's office, Judge Maynard ordered them to leave the second floor area because they were in violation of his April 23 order. He warned them that they

would be held in contempt if they did not leave. When they refused to leave the area, Judge Maynard ordered the plaintiffs jailed for contempt. They were released the following day by order of the Idaho Supreme Court upon their application for a writ of habeas corpus.

On April 30, 1985, Crooks petitioned the Idaho Supreme Court for a writ of prohibition to restrain Judge Maynard from enforcing the April 23 order, or any like order, and from interfering with the operation of the office of the clerk of the district court for Nez Perce county. On May 15, 1985, Judge Maynard issued another administrative order that rescinded the administrative order of April 23 and the contempt order of April 25. However, the order went on to state that Holmes was not permitted to act as deputy clerk because she was not hired pursuant to the established practice. On July 12, 1985, Crooks filed an amended petition for writ of prohibition requesting that Judge Maynard be restrained from enforcing his orders of April 23 and May 15 and requesting a general injunction prohibiting Judge Maynard from interfering with the operations of the office of the clerk of the district court. The Idaho Supreme Court recently denied the petition for writ of prohibition. *Crooks v. Maynard*, 112 Idaho 312, 732 P.2d 281 (Idaho 1987). The court concluded that the administrative orders of April 23 and May 15 were within Judge Maynard's power and authority under Idaho law. *Id.* at —, 732 P.2d at 288.

Meanwhile, in June 1985, the plaintiffs filed the § 1983 actions in federal district court, the appeals of which are now before us.[1] In her complaint Crooks alleged that 1) her constitutional office was usurped, 2) she was imprisoned without due process of law, 3) she was denied rights of association and free speech, 4) she was arrested without probable cause, and 5) her right to be informed of the true nature and cause of the

[1]The actions were filed separately but were consolidated upon Judge Maynard's motion on August 21, 1986.

accusation against her was violated. Holmes made all of the same claims except the first.

The United States District Court for the District of Idaho found that Judge Maynard was protected by absolute judicial immunity and granted summary judgment in his favor. Crooks and Holmes timely filed this appeal.

II.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). Moreover, the issue of whether a judge is protected by judicial immunity is a question of law reviewable de novo. *See Brewer v. Blackwell*, 692 F.2d 387, 390 (5th Cir. 1982).

III.

DISCUSSION

[1] Not surprisingly, judicial immunity is a subject in which judges are keenly interested. Perhaps cases involving judicial immunity should not be decided by judges. At present, however, there is no escape for judges from this duty. Mass recusals would solve nothing. Therefore, we must determine the validity of Judge Maynard's claim of judicial immunity. We take our cue from the Supreme Court's most recent pronouncement on the subject, *Stump v. Sparkman*, 435 U.S. 349 (1978), and our own recent en banc decision in *Ashelman v. Pope*, 793 F.2d 1072 (9th Cir. 1986) (en banc). The long-established common law rule is that judges are immune from damage liability for acts performed in their official capacities. *See Ashelman*, 793 F.2d at 1075. The immunity is absolute; it applies even where a judge acts maliciously. *Stump*, 435 U.S. at 356. In enacting 42 U.S.C. § 1983, Congress did not abrogate the doctrine of absolute judicial immunity. *Id.*

[2] In *Stump*, the Supreme Court established a test of two somewhat overlapping parts for determining whether a judge enjoys absolute immunity from money damages in a suit under § 1983. The initial inquiry is whether the judge dealt with the plaintiff in his judicial capacity, i.e., whether his acts were judicial acts. *Id.* at 362. If not, the judge is not absolutely immune. The second part of the test, assuming the judge was acting in his judicial capacity, is whether he was acting in "clear absence of all jurisdiction." *Id.* at 357. In such case there also is no absolute immunity. The partial overlap occurs because an action "in clear absence of all jurisdiction" very frequently cannot be classified as judicial.

Because the Idaho Supreme Court has already concluded that Judge Maynard acted within his power and authority in entering the April 23 administrative order,[2] *Crooks*, 732 P.2d at 288, the sole issue before us is whether Judge Maynard is immune from liability for holding Crooks and Holmes in contempt for violation of that lawful order.[3] The district court found that the contempt order was a judicial act not done in the clear absence of jurisdiction. It thus ruled that Judge Maynard was immune from suit. We agree.

A. *Judicial Capacity*

[3] In determining whether a particular act is a "judicial" one, we are instructed to consider two factors: (1) "whether it is a function normally performed by a judge," and (2) "whether [the parties] dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362. The first factor presents no

[2]The only claim made by Crooks in connection with the administrative order itself was that the issuance of the order usurped her state constitutional office. This claim fails because of the Idaho Supreme Court's holding that the order was proper.

[3]The Idaho Supreme Court specifically declined to address the propriety of Judge Maynard's use of the contempt power, because the issue was moot in the case before it. *Crooks*, 732 P.2d at 288 n.3.

problem. The issuance of a contempt order is undoubtedly a function normally performed by a judge. *See King v. Love*, 766 F.2d 962, 966 (6th Cir.), *cert. denied*, 106 S. Ct. 351 (1985).

The more difficult question is whether Crooks and Holmes dealt with the judge in his judicial, as opposed to some other, capacity. Some have suggested that there is a fairly clear line between acts done in a judge's judicial capacity and acts done in his executive or administrative capacity. *See Forrester v. White*, 792 F.2d 647, 663 (7th Cir. 1986) (Posner, J., dissenting), *cert. granted*, 107 S. Ct. 1282 (1987). Those falling on the administrative line are undeserving of absolute immunity, it is argued. The problem with this distinction is not that it cannot be drawn but that it ignores the reality of present day judging. Virtually all judges, state and federal, are required to perform duties not involving sitting on the bench or preparing orders, legal memoranda, and opinions. The presence of staff personnel and the frequently large numbers of judges that serve on a single trial or appellate court generate duties and activities that can be described as administrative or executive in character but which are essential to the functioning of the court. While many of these are discharged by the chief or presiding judge, many are also borne by rank and file judges. Obviously there are activities that under no circumstances can be deemed to be judicial, e.g., arranging the court's spring party. However, direction of a court's staff in a manner designed to improve overall judicial performance frequently is as important as remaining on the bench longer hours, in-chambers conferencing with attorneys, or producing more and better opinions. If the purpose of absolute immunity is, as Judge Posner suggests in his dissent in *Forrester*, to protect judges "from being seriously deflected from the effective performance of their duties," *id.* at 660, it must be recognized that today's judge administers as he judges and that the sharp line that can be drawn between a judicial act, such as ruling on the admission of evidence, and

managing court or chambers personnel, is useless in fixing th limits of judicial immunity.

[4] In any event, Judge Maynard acted in a judicial capacit when he entered and sought to enforce an order that, whil directed at what might be perceived to be an administrativ problem, was within his power to enter. His act was a judicia act even though many judges would not have exercised thei judicial powers as did he.[4]

B. *Clear Absence of All Jurisdiction*

The Supreme Court in *Stump* employed a broad definitio of the term "jurisdiction" in applying the second part of it two part test. *See* 435 U.S. at 356-57; *accord Ashelman*, 79 F.2d at 1076 ("Jurisdiction should be broadly construed t effectuate the policies supporting immunity."). The Cou employed the distinction drawn in *Bradley v. Fisher*, 80 U.S (13 Wall.) 335 (1872), between acts "in excess of jurisdiction (criminal court judge convicts plaintiff for a nonexister crime) and acts "in clear absence of all jurisdiction" (probat judge tries a criminal case). *Id.* at 351-52. Judicial immunit is pierced only in the latter class of cases. A judge, the Cou repeated, is not acting in the "clear absence of jurisdiction when "the action he took was in error, was done maliciousl or was in excess of his authority." *Stump*, 435 U.S. at 356. H

[4]The plaintiffs argue that Judge Maynard "acted out of personal motiv tion and used his judicial office as an offensive weapon to vindicate pe sonal objectives." Appellant's Brief at 20. The plaintiffs' focus on tl judge's intentions is misplaced. Evil intent or motive does not transform judicial act into a nonjudicial one. *O'Neil v. City of Lake Oswego*, 642 F.2 367, 370 (9th Cir. 1981). In *Harper v. Merckle*, 638 F.2d 848 (5th Cir.), *ce denied*, 454 U.S. 816 (1981), the Fifth Circuit relied on the improp motives of the judge to find that the judge's actions were nonjudicial. *Id.* 859. However, the Fifth Circuit in a later case noted that *Harper*, "by i own terms, is virtually without precedential value," and criticized *Harpe* reliance on intent. *Adams v. McIlhany*, 764 F.2d 294, 298 n.4 (5th Ci 1985), *cert. denied*, 106 S. Ct. 883 (1986).

retains his immunity "even if his exercise of authority is flawed by the commission of grave procedural errors." *Id.* at 359.

Crooks and Holmes contend that Judge Maynard acted in clear absence of all jurisdiction when he held them in contempt for failing to obey his lawful administrative order. They argue that a judge, acting in his role as an administrative judge,[5] has no power to enforce his administrative orders with a judicial contempt order. Enough has already been said to indicate our reservations about such an approach. However, to resolve the "clear absence of all jurisdiction" issue, we turn first to statutory grants of authority.

[5] Idaho Code § 1-1603 provides that "[e]very court has power: . . . [t]o compel obedience to its . . . orders." Section 7-603 of the Idaho Code states that "[w]hen a contempt is committed in the immediate view and presence of the court . . . it may be punished summarily." Section 7-601 defines as contempts of the authority of the court: (3) "Misbehavior in office or other wilful neglect or violation of duty by . . . [a] clerk . . . or other person appointed or elected to perform a judicial or ministerial service" and (5) "Disobedience of any lawful judgment, order or process of the court."

The district court held that Idaho Code § 7-601(3) provided sufficient authority for Judge Maynard's actions. The court characterized the plaintiffs' failure to comply with the administrative order as falling within the broad category of "misbehavior in office" (Crooks as the clerk and Holmes as another person appointed to perform ministerial service) subject to summary contempt.

[5]Idaho Code § 1-907, delineating powers and duties of an administrative judge, does not mention a contempt power. However, that section explicitly provides that the powers of an administrative judge are not limited to those described therein.

[6] We are reluctant to find that Judge Maynard's contempt order was squarely authorized by § 7-601(3) because we do not believe Holmes falls within the category of "appointed or elected" persons. However, Title 7, chapter 6 of the Idaho Code does not circumscribe the judicial contempt power; it merely provides statutory guidance. *Marks v. Vehlow*, 105 Idaho 560, 566, 671 P.2d 473, 479 (Idaho 1983). Idaho judges have an inherent common law contempt power, and Idaho Code § 1-1603 recognizes this broad power. *Id.* In Idaho Code §§ 7-601(3) and (5) the legislature has demonstrated its concern for giving courts power to enforce their lawful orders and to control behavior by court personnel who play an integral role in the judicial process. The statutory framework strongly suggests that Judge Maynard did not act in clear absence of all jurisdiction.

[7] The Idaho Supreme Court has "recognize[d] that the function of the court may be jeopardized should a clerk hire or appoint an incompetent, unqualified, irresponsible or untrusty person as a deputy to perform court-related duties." *Crooks*, 732 P.2d at 287. An administrative judge must have the power to enforce his decisions with respect to court-related personnel to prevent severe impairment of "the smooth, efficient and proper operation of the court system itself," *id.* Thus the administrative and judicial roles of the administrative district judge in Idaho are inextricably interwined. A judge using his judicial contempt power as a means of enforcing an administrative order aimed at ensuring effectiveness in the operation of the district court, while perhaps not acting wisely, is not acting in the clear absence of all jurisdiction.

We recognize that some courts have held that a judge is not immune from liability in connection with the hiring and firing of court personnel. *See McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.), *cert. denied*, 107 S. Ct. 574 (1986); *Laskowski v. Mears*, 600 F. Supp. 1568 (N.D. Ind. 1985). Courts have stated that the "[h]iring and firing of employees is typically an

administrative task," *McMillan*, 793 F.2d at 155, and that these "personnel decisions are separate from the jurisdiction, power and authority of the court," *Laskowski*, 600 F. Supp. at 1573. Our reservations with respect to the approach of these cases have already been stated. In any event, the issuance of a contempt order is an inherent judicial function, and is expressly authorized by the Idaho legislature as a means of addressing violations of court orders and misbehavior by court personnel. In violating the lawful administrative order the plaintiffs here were dealing with Judge Maynard in his judicial capacity, and he was not acting "in clear absence of all jurisdiction."

AFFIRMED.

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No. 87-299

In The
Supreme Court of the United States
October Term, 1987

Donna Crooks and Brenda Holmes,
Petitioners-Appellants,

vs.

Honorable John H. Maynard,
Respondent-Appellee.

BRIEF IN OPPOSITION TO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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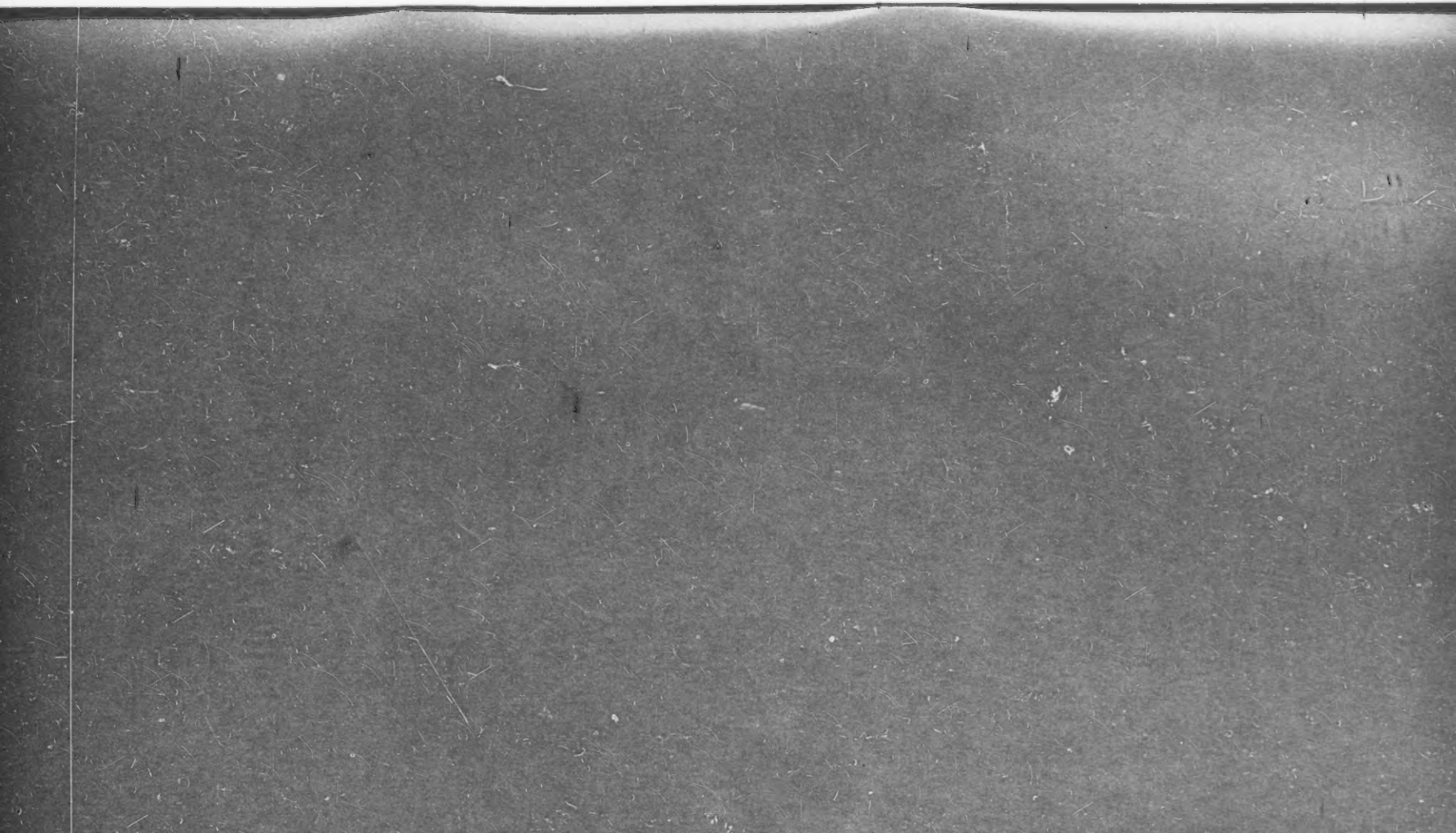

QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented does not accurately relate the issues presented to and resolved by the Court of Appeals for the Ninth Circuit. The sole issue presented is whether a state court judge has immunity from a claim for damages brought under 42 U.S.C. § 1983 by the clerk of the court and her assistant arising out of the enforcement of an administrative order by use of the judge's contempt powers.

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STATUTES INVOLVED

The statutes involved in this case include those identified by Petitioners and Idaho Code § 7-601, which is set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is argumentative and does not accurately reflect the facts presented to the courts below. Respondent would refer this Court to the factual recitations contained in the opinions of the courts below as well as the thorough findings of fact made by the panel of three Idaho judges and adopted by the Idaho Supreme Court in *Crooks v. Maynard,* 112 Idaho 312, 732 P.2d 281 (1987), a copy of which is contained in the Appendix to this Brief.

SUMMARY OF ARGUMENT

1. The Courts below correctly found Respondent Maynard immune from suit on Petitioners' Claims.

2. The unusual facts of this case do not raise an issue necessitating review by the United States Supreme Court.

ARGUMENT

I. RESPONDENT WAS ENTITLED TO IMMUNITY FROM SUIT ON PETITIONERS' CLAIMS.

The authority of Judge Maynard to enter the administrative order of April 23, 1985 regarding Petitioner Holmes' activities with respect to the deputy clerks of the court has been established by the Idaho Supreme Court in *Crooks v. Maynard,* 112 Idaho 312, 732 P.2d 281 (1987). Thus, the only issue before the Court of Appeals below, and before this Court, is whether Respondent Maynard is immune from liability for holding Petitioners in contempt for violating that lawful order.

The test for determining this immunity is set forth in *Stump v. Sparkman,* 435 U.S. 349 (1978): was the judge acting in his judicial capacity, and was he acting in clear absence of all jurisdiction. In deciding whether a judge acted in his judicial capacity two factors are relevant: Was the act complained of a function normally performed by a judge, and were the parties dealing with the judge in his judicial capacity.

Here, it is beyond question that the issuance of a contempt order is an act normally performed by a judge.

It is also clear that the Petitioners were dealing with Judge Maynard in his judicial capacity. Indeed, Idaho law requires the clerk of the district court to perform such duties as may be required by the rules and practice of the court. *See,* Idaho Code § 1-1001 at p. 45 of Petitioners' Brief. In this regard, the case is virtually indistinguishable from *McAlester v. Brown,* 469 F.2d 1280 (5th Cir. 1972) in which a relative of a criminal defendant asked the judge in chambers about the defendant's trial date; was asked by the judge to leave, and was held in contempt for refusing to do so. The Court of Appeals for the Fifth Circuit affirmed immunity on the part of the judge. There, the Plaintiff was not before the judge as a party to any proceeding, the judge was not in his robes or in a courtroom.

In this case the Idaho Supreme Court has ruled that an Idaho administrative district judge has the right and perogative to determine the qualifications of judicial personnel, by common law and by statute. *See Crooks v. Maynard, supra.* Thus, the order in question was proper. Enforcement of that order can only be done by a district judge. The exercise of the contempt power is something only a judge may do. The Petitioners in this case, as regards the enforcement of the order, were dealing with Respondent Maynard solely in his judicial capacity.

Nor was Judge Maynard acting in clear absence of all jurisdiction. Idaho Code § 1-1601 set forth at pp. 45-47 of Petitioners' Brief, states that every court has the power to compel obedience to its judgments, orders and process and to control the conduct of its ministerial officers. Idaho Code § 7-603, at pp. 47-48 of Petitioners'

Brief, permits summary punishment of contempt committed in the immediate view and presence of the Court or judge at chambers. Petitioners' attempts to characterize the place of the occurrence of this incident as beyond the Respondent's chambers is of no consequence, since the area in question contains the judge's chambers as well as the desks of the deputy clerks. Idaho Code § 7-601(5) set forth in the Appendix of this Brief defines contempt as including disobedience of any lawful judgment, order or process of the court. Further, the Idaho Courts have long held that Idaho judges have inherent common law contempt powers, beyond those described in the foregoing statute. *See, Marks v. Vehlow*, 105 Idaho 560, 671 P.2d (1983).

Judge Maynard was not acting in clear absence of all jurisdiction in using his broad contempt powers to compel obedience of a lawful order.

Thus, all of the tests of *Stump v. Sparkman, supra,* were met, and this case was properly decided below.

II. THE UNUSUAL FACTS OF THIS CASE WILL NOT ADVANCE RESOLUTION OF A PERCEIVED CONFLICT IN THE COURTS OF APPEAL REGARDING JUDICIAL IMMUNITY.

Petitioners attempt to characterize this case as one presenting solely an administrative problem, in order to bring it within a perceived conflict between the Courts of Appeal on the scope of judicial immunity in administrative matters. However, this case presents a narrow and unusual set of facts centering entirely on the use of con-

tempt powers, the authority of the judge to enter the administrative order having been determined by the Idaho Supreme Court. This Court has previously granted certiorari in the case of *Forrester v. White,* 792 F.2d 647 (7th Cir. 1986) cert. granted 107 S.Ct. 1282 (1987), which squarely presents the issue of immunity for administrative actions in a not uncommon situation, the firing of court personnel. Acceptance of certiorari in this case would not materially advance the resolution of that issue.

———o———

CONCLUSION

It is respectfully requested, based upon the foregoing, that this honorable Court deny the Petition for Writ of Certiorari.

DATED this 18th day of September, 1987.

QUANE, SMITH, HOWARD & HULL

By BRIAN K. JULIAN and
KATHRYN A. STICKLEN, Of the Firm
Counsel for Respondent

APPENDIX

IDAHO CODE

Section 7-601

7-601. *Contempts defined.*—The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceedings.

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceedings.

3. Misbehavior in office or other wilful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner or other person appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order or process of the court.

6. Assuming to be an officer, attorney, counsel of a court, and acting as such without authority.

7. Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

8. Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience, by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer. [C.C.P. 1881, § 830; R.S., R.C., & C.L., § 5155; C.S., § 7383; I.C.A., § 13-601.]

IDAHO SUPREME COURT REPORT

I S C R A SERVICE OF JAG CORPORATION
P.O. BOX 2576 BOISE, IDAHO 83701

Vol. 87, No. 7

IN THE SUPREME COURT OF THE
STATE OF IDAHO
No. 15983

DONNA CROOKS,	)	
	)	BOISE,
Petitioner,	)	NOVEMBER
	)	1986 TERM
v.	)	
	)	FILED:
HONORABLE JOHN H. MAYNARD, DISTRICT JUDGE,	)	January 30, 1987
	)	FREDERICK C.
Respondent.	)	LYON, CLERK

Petitioner, Donna Crooks, brought an original proceeding in the Idaho Supreme Court pursuant to Id. Const., art. 5, § 9, requesting an issuance of a writ of prohibition against Respondent, Judge Maynard. Because questions of fact were involved, the Idaho Supreme Court referred the matter to a panel of Masters consisting of, the Hon. Jesse R. Walters, (Chief Judge of the Idaho Court of Appeals), the Hon. Charles S. Scoggin, (Retired District Judge from the Fifth Judicial District), and the Hon. James G. Towles, (Retired District Judge of the First Judicial District). The panel recommended that a writ of prohibition not be issued. *Writ denied.*

William J. Tway, Esq., Faber F. Tway, Esq., Anton Hohler, Esq., of Tway & Tway, Boise, Idaho, attorneys for petitioner, Crooks.

Brian K. Julian, Esq., Boise, Idaho, attorney for respondent, Judge Maynard.

Byron Johnson, Esq., Boise, Idaho, attorney for Intervenor, Idaho District Judges' Association.

87 ISCR 75

Roger Madsen, Esq., Boise, Idaho, attorney for Intervenor, Association of Idaho Counties.

DONALDSON, J.

This case arises out of a dispute between an administrative district judge and a district court clerk. The district court clerk, Petitioner Crooks, initiated an original proceeding in the Supreme Court requesting an Alternative Writ of Prohibition be issued against Judge Maynard, the administrative district judge. The case was submitted to a Panel of Masters for the purpose of receiving evidence, making Findings of Fact and Conclusions of Law, and entering a recommendation to the Court. The Masters recommended that a Writ of Prohibition should not be issued. We agree and accordingly, *deny the application for the Writ of Prohibition.*

At all times relevant to these proceedings, Donna Crooks was the Clerk of the District Court, and ex officio Auditor and Recorder for the County of Nez Perce, Idaho, and John Maynard was the Administrative District Judge of the Second Judicial District of the State of Idaho. Nez Perce County is in the Second Judicial District. The controversy between the two parties is really an issue of whether the administrative district judge and/or the court clerk has supervisory powers over deputy district court clerks when they are performing judicial functions.

The facts, as found by the Masters, are straight forward. Clerk Crooks hired Donna Holmes as a deputy clerk some time in April of 1985. Holmes' functions were to aid in the evaluation, coordination and organization of the duties of the deputy clerks of the district court. Subsequently, on April 23, 1985, Judge Maynard issued an administrative order which addressed the hiring of Donna Holmes. Premised upon her hiring without the knowledge of the administrative district judge and without the opportunity for any judge to appraise her qualifications and integrity, the order stated that Holmes "shall perform no duties connected with the operation of the courts nor shall she interfere with the manner that the deputies perform their duties." The order went on to require Clerk Crooks to submit a plan to restore the working conditions of the deputy clerks to their former excellent status, or to cease further interference with the deputy clerks performance of their duties.

On April 24, 1985, Judge Maynard found both Crooks and Holmes in violation of the April 23 order and had them jailed for contempt. They were released the following day by order of this Court upon their application for a Writ of Habeas Corpus. On the same day, Judge Maynard entered an order stating the circumstances which gave rise to the contempt of court determination.

On April 30, 1985, Clerk Crooks initiated the present proceeding which is a petition to the Supreme Court for an Alternative Writ of Prohibition, to restrain Judge Maynard from enforcing the April 23 order, or any like order, and from interfering with the operation of the office of the clerk of the district court for Nez Perce county.

On May 15, 1985, Judge Maynard issued another administrative order which, in effect, rescinded the administrative order of April 23, and the contempt order of April 25. However, the order further held that Holmes was not permitted to act as a deputy clerk because she was not hired pursuant to the established practice.

On July 12, 1985, Clerk Crooks filed an Amended Petition for Alternative Writ of Prohibition. In this amended petition, Clerk Crooks sought resolution of two issues:

> "(a) Should Judge Maynard be restrained for enforcing the administrative orders entered on April 23, 1985 and May 15, 1985, forbidding Brenda Holmes or any other person that may be hired without any consultation, notice or consent of a district judge to act as a deputy clerk of the district court"?
>
> "(b) Should Judge Maynard be restrained from interfering with the operation of the office of the clerk of the district court and ex officio auditor and recorder of Nez Perce County, Idaho"?

A Writ of Prohibition is an extraordinary remedy. Rust v. Stewart, 7 Idaho 558, 64 P. 222 (1901). Its purpose is to "arrest" the proceeding of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person, and where there is no plain, speedy and adequate remedy otherwise available at law. I.C. §§ 7-401, -402.

In her Amended Petition for Alternative Writ of Prohibition, Clerk Crooks requested that Judge Maynard be restrained from enforcing his orders of April 23 and May 15, 1985, forbidding Brenda Holmes or any other per-

son from acting as a deputy clerk without prior approval of the district court. Clerk Crooks also requested a general injunction, prohibiting Judge Maynard from interfering with the operations of the office of the clerk of the district court in Nez Perce County.

Before we address the ultimate controversy surrounding this case, we need to point out that part of the relief requested by Crooks has become moot. The order entered by Judge Maynard on April 23, 1985, was rescinded by the order entered on May 15, 1985. For this reason, a prohibitory writ should not be issued restraining Judge Maynard in respect to the enforcement of the April 23 order.

Also, Clerk Crooks requested in her Amended Petition for an Alternative Writ of Prohibition that Judge Maynard be restrained from interfering with the operation of the office of ex officio auditor and recorder of Nez Perce County. However, after examining the evidence presented to the Masters, we conclude the Judge Maynard in no way interfered with Clerk Crooks' functions or duties as ex officio auditor or recorder for the county. The record is totally lacking with respect to such evidence, and therefore, there is no basis for issuing a prohibitory writ in respect to Clerk Crooks' functions as auditor and recorder.

We now turn to the real heart of this case. Clerk Crooks requested that Judge Maynard be prohibited from interfering with her duties as court clerk. This requires a determination of the respective powers and duties of the administrative district judge and the clerk of the district court of a judicial district. More specifically, we are concerned with the relative roles of the administrative district judge and the clerk of the district court in respect to the hiring, supervision and firing of the court clerks.

The beginning point in our analysis is the Idaho Constitution and the relative powers the document gives to clerks of the district court and to judges. Prior to statehood, clerks of the district court were appointed by judges and served as a clerk for a particular district, subject to judicial control. The Organic Act of the Territory of Idaho, 12 Stat. 808, 813 ch. 17, § 9 (1863). However, the Idaho Constitution changed the selection process of the clerk. Art. 5, § 16 of the constitution provides: "A clerk of the district court for each county shall be elected by the qualified voters thereof at the time and in the manner prescribed by law for the election of members of the legislature, and shall hold his office for the term of four (4) years." This constitutional provision changed the status of the clerk from that of an appointed official to that of an elected official. The question that arises is whether this provision allows the clerk of the district court, as an elected official, the right to exercise unbridled discretion over the administration of his or her office.

The answer is obviously no. The office of the clerk of the district court is created in art. 5, § 16. Art. 5 of the constitution is the article creating the judicial branch. Therefore, we conclude that the office of the district court clerk is in fact part of the judicial branch. Our conclusion is buttressed by the holding in State v. Wharfield, 41 Idaho 14, 236 P. 862 (1925). There, the Court held that a county prosecuting attorney was a judicial officer and not an executive office—because the office is created in art. 5 of the constitution.

In another section of the constitution, art. 18, § 6 (addressing county organization and offices) provides that the clerk of the district court shall also serve as the county's

ex officio auditor and recorder. That section further provides that the "auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistance as the business of their office may require, said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners." The question before us now is what effect does art. 18, § 6 have on the status of clerk of the district court as a judicial officer created by art. 5, § 16?

An opinion of this Court issued shortly after statehood addressed both art. 5, § 16, and art. 18, § 6. In Hilliard v. Shoshone County, 3 Idaho 103, 27 P.2d 678 (1891), the Court was faced with deciding the amount of compensation that should be paid to the person holding the offices of clerk of the district court and auditor and recorder. The Court there stated:

> "Thus far the constitution has provided for a clerk of the district for each county and has made this officer ex-officio auditor and recorder. He is still one person and one officer, although he holds two or three distinct and separate offices, if we please to call them so, and performs the duties of all. We must not confound the office with the officer or person who holds the office. The compensation is not paid to the office of the district clerk, nor to the office or offices of auditor and recorder, but to the one person or officer who holds all these offices, and performs the duties thereof. The constitution having created this officer, and directed what positions he shall hold and the duties he shall perform, then proceeds to provide for his compensation." 3 Idaho at 106.

This holding, just a few years after statehood, indicates that the leading authorities of the time considered the office of the court clerk to be separate and distinct from that of

county auditor and recorder. The framers of the constitution, in enacting art. 18, § 6, did not intend to alter the status of the clerk as a judicial officer as provided for in art. 5, § 16 . Instead, their intent was to provide for one person to hold two offices—that of county auditor and recorder with that of clerk of the district court.

Since the office of the clerk of the district court is created in art. 5 not art. 18, the office is within the domain of and subject to the power of the judicial branch. Accordingly, the legislature does not have the authority to deprive the judicial branch of its power and control over the office (*see* art. 5, § 13 and R.E.W. Construction Co. v. District Court of Third Judicial District, 88 Idaho 426, 400 P.2d 390 (1965)).

The power of the judicial branch became unified in 1962 when art. 5, § 2 was amended. This section now provides:

> "2. *Judicial power—Where vested.*—The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a *unified and integrated judicial system for administration and supervision by the Supreme Court.* The jurisdiction of such inferior courts shall be as prescribed by the legislature. Until provided by law, no changes shall be made in the jurisdiction or in the manner of the selection of judges of existing inferior courts. (Emphasis added.)"

In effect, with this amendment Idaho has followed the lead of New Jersey[1] and other states in adopting a "uni-

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[1] New Jersey, in 1947, became the first state judiciary to adopt the unitary management structure. Presently, 41 of 50 states, and the District of Columbia, have unitary court systems.

tary" system of judicial management. The purpose of a "unitary" system of judicial management is to centralize the administrative power of the entire judicial system in the Supreme Court and make the chief justice the administrative head of all courts. Rutledge v. Workman, 332 S.E. 2d 831 (W.Va. 1985). In turn, to further the interests of a unified and integrated judicial system, the Supreme Court through the chief justice has delegated some management authority to the administrative director of the courts to oversee the whole court system, and to the administrative judge[2] of each district to oversee the management of the court system in his district. In addition, the district judges and magistrates have been given day-to-day management authority over their courts. When administrative disputes arise between judges within a judicial district, the Supreme Court has delegated decision-making power to the administrative district judge to settle those disputes. Basically, the Supreme Court, acting through the chief justice is the supervisor for all judicial personnel. The clerk of the district court, a position created in art. 5, falls within this supervisory control of the Supreme Court and any supervisory control passed down to the administrative director, administrative judge and district judge.

I.R.C.P. 77(c) and 79 (f) are examples of rules exercising the power to supervise and direct the clerks of the district court. I.R.C.P. 77(c) states:

> "Rple 77(c). *Clerk's office and orders by clerk.*— The office of the clerk of the district court with the clerk or deputy in attendance shall be open for the

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[2] The administrative district judge is elected by a majority of the other district judges within the district. (I.C. § 1-703).

> transaction of business on such days and during such hours as the administrative district judge of the judicial district in which the county is located may prescribe. All motions and applications in the clerk's office for issuing process, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown."

I.R.C.P. 79(f) states:

> "Rule 79(f). *Other books and records of the clerk.*—The clerks of the district courts and all judges shall also keep such other books and records as are required by the statutes of the state, or as may be requested by the director of the administrative office of the courts of the state of Idaho."

See also, Rule 31, Idaho Court Administrative Rules.

Additionally, the legislature has statutorily recognized that the clerk of the district court is a judicial officer. The general duties of the clerk of the district court are enumerated in Title 1, ch. 10, Idaho Code. Most statutory enactments relating to courts and court officials are contained in Title 1. As such, placement of the statutes relating to the clerk of the district court in Title 1 is consistent with the mandates of art. 5.

I.C. § 1-1001 specifically recognizes the role of the clerk of the district court. This section states:

> "1.1001. *Duties of clerk.*—The clerk of the district court must perform such duties as are prescribed in the Code of Civil Procedure and in the Penal Code, and such duties as may be required of him by the rules and practice of the court."

The Code of Civil Procedure and the Penal Code have been superseded by the Idaho Court Rules as adopted by the Supreme Court pursuant to its inherent rule-making power. *See generally, R.E.W. Const. Co. v. District Court of Third Judicial District, supra.*

Further, I.C. § 1-907, addressing the power of the administrative district judge, provides in part:

> "The administrative judge or acting administrative judge in each judicial district, subject to the rules of the supreme court, shall have administrative supervision and authority over the operation of the district courts and magistrates in the district. These powers and duties include, but are not limited to, the following:
>
> ". . . .
>
> "(c) Supervising the clerks of the district courts in the discharge of the clerical functions of the district courts; . . . ."

See also, I.C. §§ 1-601 (clerks of the district courts are officers of courts); and 1-614 (record keeping duties confirmed of judges, clerks, and other officers). In essence, the legislature with these enactments has acknowledged that the clerk of the district court is subject to the control and direction of the judiciary. The constitution itself and the above legislative statutes make it abundantly clear—the clerk of the district court is a judicial officer, subject to the administration power of the Supreme Court.

However, the power and control of the judicial branch over the office of the clerk of the district court is not absolute. Art. 5, § 16 provides for the election of the clerk of the district court by the qualified voters in each county. Thus, the judiciary's power over a clerk is somewhat sub-

servient to the right of the people to choose the person they believe most qualified to hold the office.

A further and very practical limitation arises when the full impact of art. 18, § 6 is considered. Even though a clerk of the district court is a judicial official, the person holding that office is also a county official when carrying out the duties of county auditor and recorder. When the officer changes hats from county auditor and recorder to the clerk of the district court, the supervisory control is in the judiciary.

However, it is necessary to make clear that this limitation applies to the person and not to the office. Art. 2, § 1 of the constitution:

> "§ 1. *Departments of government.*—The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."

The section delineates the doctrine of separation of powers as it relates to the coordinate branches of government—where a power is given to one department, another department cannot act. State ex rel. Hansen v. Parsons, 57 Idaho 775, 69 P.2d 788 (1937). The legislature cannot exercise any supervisory power over the clerk of the district court when exercising judicial functions, because the clerk is an arm of the judicial branch. The officer, when wearing a judicial hat can only be supervised by an appropriate judicial official.

Further, art. 18, § 6 provides that the clerk of the district court cannot appoint deputies and assistants unless authorized to do so by the county commissioners. At first blush, this provision appears to give the county commissioners more control than they actually have. The county commissioners power, at least with respect to the clerk of the district court, is limited and cannot be exercised to override every hiring decision. Upon a showing to the proper tribunal that a deputy or clerical assistant is needed, the county commissioners must authorize the appointment. Dukes v. Board of County Commissioners, 17 Idaho 736, 107 P. 491 (1910) (commissioners were ordered to authorize an appointment upon a district court's finding that the business of the office of clerk of the district court needed a deputy).

We are mindful of Campbell v. Board of Commissioners of Canyon County, 5 Idaho 53, 46 P. 1022 (1896) which held that county commissioners had discretion to authorize appointment of a deputy to the sheriff's department. This case is easily distinguishable because the sheriff's office is a county office, unlike the office of clerk of the district court which is a judicial office created in art. 5.

The judiciary's role in hiring is also limited. The district judge's authority to supervise the clerk of the district court in the discharge of clerical duties does not include the authority or power to dictate to the clerk who shall be hired as an assistant or as a deputy. A deputy serves as the alter ego of the clerk, performing functions and duties in the place of the clerk. For example, I.C. § 1-1002 provides that, "[t]he clerk must in person or by deputy attend every term of the district court held in his

county. All acts done and process issued by the deputy must be in the name of his principal." Because the clerk is elected by voters and is not selected or appointed by the judiciary, we conclude that the judiciary does not have the authority to choose "alter ego" deputies to perform functions and duties of the clerk. Furthermore, the constitution, in art. 18, § 6 and the related statute, I.C. § 31-3107, specifically give the clerk of the district court the power to hire deputy clerks.

A contrary result would create a myriad of problems. The clerk of the district court also serves as county auditor and recorder and must have assistants to aid in the performance of these functions. In several of our smaller counties, the offices of clerk, auditor and recorder may need only one or two deputies to assist in carrying out the duties of all of these offices, both judicial and county. As such, any single deputy must be able to perform both judicial and county functions. If a district judge is able to dictate who the district court clerk hires, he ultimately is able to usurp the power of county auditor and recorder. This result is contrary to art. 2, § 1.

However, the right of the district court clerk to exercise discretion in hiring deputies must be balanced against the constitutional mandate of a unified and integrated judicial system. To further the orderly administration of the courts, judges must be able to set—and require the clerks to follow—hiring guidelines for deputy clerks performing judicial functions. For example, the judge can require the clerk to hire only people who have certain minimum educational or experience qualifications. Of course, the best policy is for the clerks and judges to work

closely together and cooperate in the hiring process to ensure efficiency and effectiveness in the operation of the district courts and county auditor and recorder offices.

Although we have concluded that the hiring and firing of deputy clerks is within the province of the clerk of the district court, and that the administrative district judge and/or district judge is not empowered to decide who shall be hired or appointed to serve as deputy clerks, we recognize that the function of the court may be jeopardized should a clerk hire or appoint an incompetent, unqualified, irresponsible or untrusty person as a deputy to perform court-related duties. By statute, the clerk is liable on his official bond to any person injured by a deputy's wrongful act or omission to perform any duty imposed by law. I.C. § 1-1003. But the smooth, efficient and proper operation of the court system itself may be nontheless severely impaired or adversely affected depending upon the conduct of the court-related personnel. Therefore, the district judge, in the exercise of his supervisory power over the clerical activities of the clerk of the district court, controls the assignment of persons hired by the clerk. If the clerk makes an assignment of personnel to a judicial function which the judge finds unacceptable, he can refuse to accept that assignment. Consequently, the district judge has the power to require a reassignment of personnel to assist in judicial-related functions.

However, the clerk of the district court is not without remedy, if he or she is unable to comply with, or disagrees with, the directives of the district judge as an officer created by art. 5, the clerk of the district court can request the administrative judge of the district and ultimately the Supreme Court, through the administrative director of the

courts, to review the judge's decision. However, the clerk will have to state with articulated reasons why the directives cannot, or should not, be followed. We do note that the clerk of the court is responsible for the performance of the clerical duties, and pending the request, must perform the expected duties.

In this case, we conclude that Judge Maynard did exercise his perogative, using his administrative authority in refusing to accept the assignment of Brenda Holmes to perform the coordination and efficiency analysis desired by Clerk Crooks.[3] In his administrative order, he stated that, without the opportunity to appraise Holmes' qualifications or integrity, she would be unacceptable to him in the performance of a deputy clerk's duties. Such was within his supervisory authority provided by I.C. § 1-907(c). Upon that basis, we conclude that Judge Maynard's action in entering the administrative orders on April 23 and May 15, 1985 were within his power and authority and, therefore, were not subject to restraint through a writ of prohibition.

Writ of prohibition is denied.

SHEPARD, C.J., BAKES, and HUNTLEY, JJ., concur.

BISTLINE, J., dissenting.

As discussed below, two important points need to be considered and accepted.

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[3] We specifically refuse to address the propriety of Judge Maynard's use of the contempt power, since it is moot.

I.

The controversy is *wholly* moot insofar as proceedings in the state of Idaho judicial system are concerned. The confrontation of elected Judge Maynard with elected district court clerk Crooks should never have happened in the first instance and would for certain appear to have been more of a clash of personalities than a question of dominant authority. Unfortunately, one of the two held an office which carried with it the power to jail for contempt. While the clash was raging, an astute writer for the *Lewiston Tribune* opined that in the public interest both persons should have resigned from office. Neither did. The electortate of the Second Judicial District attended to the problem in the November 1986 general election at which the people showed a resounding disenchantment, if not disapproval, of such shenanigans. The Second Judicial District comprises counties other than Nez Perce County, and there are and have been forever since statehood elected constitutional court clerks in those other counties, as in all of the state's 44 counties.

A more civil remedy which Judge Maynard could have sought, if he truly believed the situation intolerable and that the right was with him, would have been to seek an opinion from the Attorney General. It was unbelievable that he would order the sheriff to jail a constitutional officer in almost any conceivable circumstance, but for certain it should not have taken place as a "judicial" resolution to the petty dispute between the judge and the clerk. Both could have gone to the Attorney General, and if finding no satisfactory answer there, an appropriate extraordinary proceeding in this Court should have been filed. In all likelihood, the parties could have been brought to an ami-

cable solution short of requiring a decision. Jailing the county clerk was patently improper and a manifest disrespect for the office—if not the person—of clerk of the court.

As it turned out, this Court's jurisdiction was invoked —not by the judge seeking a clarification of his power *vis-a-vis* those of another elected constitutional court officer, but by the clerk and her deputy asking that both be freed from unlawful jail incarceration.

Even after this Court issued a writ directing their release, and even after the judge some three weeks later rescinded the contempt order which had jailed the clerk and her deputy, the judge followed up with yet another order which was based wholly on his own perceptions as to what is or is not "established practice." So pushed, the clerk sought to protect her beliefs in what she considered to be a clerk's function. This was done under the processes of another extraordinary writ [prohibition] which this court is authorized to issue in proper circumstances as a means of testing, *inter alia,* the legality of certain proceedings. As clerk, she was within her rights to seek such a writ. Similarly, Judge Maynard, as judge, could have applied to this Court for another extraordinary writ, that of mandate, to seek an order of this Court directing compliance with the views entertained by his office.

This Court received the report of the masters on May 13, 1986, and heard oral argument on November 3, 1986. Before this Court had digested the issues and arguments, both of the litigants had lost their bids for re-election, and their problem was resolved. In my view, all proceedings in this Court should have been dismissed.

In almost one hundred years there had not been another such controversy between two such persons holding two such elected offices, and personally as a boy, a young man, and an admitted attorney—fifty years of active memory—I have known of nothing but mutual cooperation and good will existing between district judges and court clerks.

Accordingly, where I differ from the majority is that I see no reason whatever to "now turn to the real heart of this case." There have been many cases in Idaho's judicial history where, for instance, a county commission comprised of three elected officials brings or is brought into litigation, and while it is pending there is a change in personnel, it is proper to substitute in the new commissioners. Similarly, with city councils, state highway commissioners, *ad infinitum*. But. although sued officials may not have a right to avoid being brought in, suing officials are free to drop the litigation.

Donna Crooks, the individual, had a right to seek her release from confinement, but she no longer has any right to pursue any action at this time in the name of the county clerk, nor does she any longer have a right to sue John H. Maynard as a district judge, which he no longer is.

The only perceivable reason for not dismissing this proceeding would have to be a desire on the part of this Court to use the occasion to go ahead and write what it has now written on a "determination of the respective powers and duties of the administrative district judge and the clerk[s] of the district court[s] of a judicial district. More specifically . . . the relative roles of the administrative district judge and the clerk[s] of the district court[s] in respect to the hiring, supervision, and firing of the *court*

clerks." Majority opinion, p. 5. (In clarfication of the opinion for the Court, I suggest that *court clerks* means deputy clerks who functions as aids of the court.)

I agree with the statement that "[o]f course, the best policy is for the clerks and judges to work closely together and cooperate in the hiring process to ensure efficiency and effectiveness in the operation of the district courts and county auditor and recorder offices." It would be preferable for the Court to say that much and no more. It is much to be doubted that the state's district court clerks are going to be pleased with a decision that places them, elected constitutional officers, under the direction and control of the Administrative Director of the Courts, a statutory creation.

II.

Since statehood, the legislature has prescribed the duties of an elected clerk of the district court. The majority opinion notes I.C. § 1-1001, and sets it out:

> 1-1001. Duties of clerk.—The clerk of the district court must perform such duties as are prescribed in the Code of Civil Procedure and in the Penal Code, and such duties as may be required of him by the rules and practice of the court.

The majority then declares that both the Code of Civil Procedure and the Penal Code have been superseded by rules of the Supreme Court promulgated "pursuant to its inherent rule-making power," and cites R.E.W. Construction Co. v. District Court of Third Judicial iDstrict, 88 Idaho 426, 400 P.2d 390 (1965). That same case is earlier cited for the proposition that "the legislature does not have

the authority to deprive the judicial branch of its power and control over the office [of the clerk]."

Just to keep the record straight, it should be kept in mind that it was the legislature in the first place which, in 1941, made the determination to recognize the inherent power of the Supreme Court "to make rules governing procedure" in the Idaho judicial system. I.C. § 1-212. Section 1-213, a part of the same 1941 enactment, in fact said the Supreme Court shall by general rules prescribe the forms of process, writs, pleadings and motions, the manner of service, time for appearance, and the practice and procedure in all actions and proceedings. But, a caveat is attached at the end of § 1-213: "Said rules shall neither abridge, enlarge nor modify the substantive rights of any litigant." It may not be incorrect to presume that the primary reason for the Court's issuance of an opinion today is to preclude the association of district court clerks from asking the legislature to intervene on their behalf—assuming, of course, that the clerks do not readily accept the Court's decision.